

STATE OF MICHIGAN
COURT OF APPEALS

In re A. E. ADAMS, Minor.

UNPUBLISHED
September 13, 2016

No. 331216
Livingston Circuit Court
Family Division
LC No. 14-014828-NA

Before: TALBOT, C.J., and O'CONNELL and OWENS, JJ.

PER CURIAM.

Respondent-father, K. Adams, appeals as of right the trial court's order terminating his parental rights to his minor child under MCL 712A.19b(3)(b)(i) (parent physically or sexually abused the child's sibling), (c)(i) (the conditions that led to the adjudication continue to exist), (g) (the parent is unable to provide proper care and custody), (h) (the parent is imprisoned for two or more years), (j) (a reasonable likelihood the child will be harmed if returned to the parent's home), (k)(ii) (the parent's abuse involved sexual penetration), and (k)(ix) (the parent's abuse involved sexual abuse). We affirm.

I. FACTUAL BACKGROUND

The Department of Health and Human Services (the Department) petitioned for jurisdiction over the child after the child's 13-year-old half-sister alleged that respondent sexually abused her when she was between the ages of 9 and 10 years old. The petition stated that respondent had been charged with criminal sexual conduct, was lodged in the Livingston County Jail, and had refused to cooperate with Children's Protective Services. The trial court placed the child in protective custody with maternal relatives.

Respondent pleaded no contest to the allegations. In exchange for the plea, the Department agreed to dismiss its request to terminate respondent's parental rights at the initial dispositional hearing. The Department proposed a treatment plan, which the trial court adopted over counsel's objections, to substance abuse and domestic violence portions.

In April 2015, a jury convicted respondent of three counts of first-degree criminal sexual conduct and two counts of second-degree criminal sexual conduct. Respondent was sentenced to serve 25 to 50 years' imprisonment. In September 2015, after the child had been moved to foster home placement, the trial court ordered the Department to petition to terminate respondent's parental rights.

At the termination hearing, respondent admitted that he would be in prison until at least 2039, could not provide the child with financial or emotional support, and had no services available to him in prison because he was in maximum security. Shana Chapman, the child's foster care case worker, testified that the therapist refused to go to the prison to complete the sex offender risk assessment. According to Chapman, she provided respondent a list of services available in prison, but she did not have phone conversations or meet face-to-face with respondent. She was unsure which programs could be completed given his situation. A prison employee informed Chapman that respondent was not engaged in any services but was on the waiting list for some services.

Ultimately, the trial court terminated respondent's parental rights.

III. STANDARDS OF REVIEW

Parents have a significant constitutional liberty interest in the care and custody of their children. *In re Miller*, 433 Mich 331, 346; 445 NW2d 161 (1989); *MLB v SLJ*, 519 US 102, 119; 117 S Ct 555; 136 L Ed 2d 473 (1996). The Department is obligated to make reasonable efforts to reunite even an incarcerated parent with his or her child. *In re Mason*, 486 Mich 142, 152, 166; 782 NW2d 747 (2010). We review for clear error whether a trial court engaged in reasonable efforts to reunify a child with his or her parent. *Id.* A finding is clearly erroneous if, after reviewing the entire record, we are definitely and firmly convinced that the trial court made a mistake. *Id.* This Court also reviews for clear error the trial court's factual findings and ultimate determinations on the statutory grounds for termination. *Id.*

“[T]he Due Process Clause requires assignment of counsel at public expense for an indigent for hearings when the state seeks to terminate his parental rights.” *Reist v Bay Co Circuit Judge*, 396 Mich 326, 346; 241 NW2d 55 (1976). When analyzing ineffective assistance of counsel claims in child protective proceedings, this Court applies the same standards as when analyzing ineffective assistance of counsel claims in criminal proceedings. *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988).

III. RIGHT TO WITHDRAW PLEA

Respondent contends that the trial court denied him his right to withdraw his plea after it failed to comply with the terms of that plea and that counsel was ineffective for failing to do so. We disagree.

Criminal protections apply by analogy to proceedings involving terminations of parental rights. See *In re Osborne (On Remand, After Remand)*, 237 Mich App 597, 606; 603 NW2d 824 (1999). Respondent did not move in the trial court to withdraw his plea on the ground that petitioner had not provided him with services. Accordingly, this issue is not preserved for appellate review. *STC, Inc v Dep't of Treasury*, 257 Mich App 528, 538; 669 NW2d 594 (2003). We will review this issue for plain error affecting respondent's substantial rights. See *In re Smith Trust*, 274 Mich App 283, 285-286; 731 NW2d 810 (2007). Similarly, respondent has not previously raised issues with trial counsel's performance, and this issue is also not preserved. See *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012). We will review this issue for mistakes apparent from the record. *Id.*

In this case, respondent pleaded no contest to the petition in exchange for the Department agreeing not to seek termination at the initial disposition and instead providing services to respondent. The Department did not seek termination at the initial dispositional hearing. It provided a service plan for respondent and a list of services in which he could participate in prison. Respondent contends he was unable to participate in services in jail, but respondent was classified as a maximum security inmate in jail due to his own behaviors. It was respondent's behaviors, not the Department's failures, which prevented him from participating in the services that were available.

We discern no plain error affecting respondent's substantial rights regarding respondent's plea.

To establish ineffective assistance of counsel, respondent must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). To prove that counsel was not effective, the parent must show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that counsel's deficient performance prejudiced the parent. See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To show prejudice, the parent must also show the reasonable probability that, but for counsel's error, the results of his or her proceedings would have been different. *Carbin*, 463 Mich at 600.

Respondent has shown neither deficient performance nor prejudice. First, counsel may have reasonably decided not to move to withdraw the plea out of concern that withdrawing the plea would have resurrected the Department's request to terminate respondent's rights at the initial dispositional hearing. In such a circumstance, the Department would not have been required to provide respondent with services regardless. See *In re LE*, 278 Mich App 1, 21; 747 NW2d 883 (2008). Second, there is no reasonable probability that the results of the proceedings would have been different had counsel moved to withdraw respondent's plea. Even had counsel so moved, by that time, a jury had convicted respondent of sexually assaulting the child's half-sister. It is not reasonably likely that an adjudication, which is held to the preponderance of the evidence standard, would have a different result than a criminal trial, at which the jury decided respondent's guilt beyond a reasonable doubt.

We conclude that counsel did not render ineffective assistance by failing to move to withdraw respondent's no contest plea.

IV. STATUTORY GROUNDS

Respondent contends that the trial court erred in terminating his parental rights because statutory grounds did not support termination. We disagree.

The relevant statutory grounds in this case are as follows:

(3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

(b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:

(i) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.

* * *

(c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:

(i) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

* * *

(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

(h) The parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

* * *

(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

(k) The parent abused the child or a sibling of the child and the abuse included 1 or more of the following:

* * *

(ii) Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate.

* * *

(ix) Sexual abuse as that term is defined in section 2 of the child protection law, . . .

“Only one statutory ground need be established by clear and convincing evidence to terminate a respondent’s parental rights, even if the court erroneously found sufficient evidence under other statutory grounds.” *In re Ellis*, 294 Mich App 30, 33; 817 NW2d 111 (2011).

Respondent contends that the trial court did not have sufficient evidence to terminate his parental rights under MCL 712A.19b(c)(i), (g), and (h) because he did not have an opportunity to demonstrate he could comply with his service plan, but he does not contest the other statutory grounds. Respondent was criminally convicted for sexually abusing the child’s half-sibling on multiple occasions. Witnesses testified about the abuse that respondent inflicted on the child’s half-sibling, which included multiple criminal sexual penetrations. This was sufficient to support terminating respondent’s parental rights under MCL 712A.19b(b)(3)(b)(i), (k)(ii), and (k)(ix). Respondent was sentenced to prison for 25 to 50 years and had not provided for the child’s care in his absence sufficient to support termination under MCL 712A.19b(3)(h). Even presuming that the trial court erred under the specific statutory grounds respondent contests, the trial court had sufficient evidence to terminate respondent’s parental rights under other statutory grounds.

We affirm.

/s/ Michael J. Talbot
/s/ Peter D. O’Connell
/s/ Donald S. Owens